

Jeffrey L. Bornstein (State Bar No. 99358)  
Luke G. Anderson (State Bar No. 210699)  
K&L Gates LLP  
55 Second Street, 17<sup>th</sup> Floor  
San Francisco, CA 94105  
Telephone: (415) 882-8200  
Facsimile: (415) 882-8220

Barry M. Hartman, *Admitted Pro Hac Vice* (DC Bar No. 291617)  
Christopher R. Tate, *Admitted Pro Hac Vice* (PA Bar No. 205510)  
K&L Gates LLP  
1601 K Street, N.W.  
Washington, D.C. 20006  
Telephone: (202) 778-9000  
Facsimile: (202) 778-9100

Attorneys for Defendant  
JOHN J. COTA

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
JOHN J. COTA,  
  
Defendant.

Case No. CR 08-0160 SI

**DEFENDANT JOHN J. COTA'S REPLY  
TO OPPOSITION TO MOTION TO  
SEVER**

Defendant John J. Cota ("Captain Cota"), by and through his undersigned counsel, hereby files this reply to the United States' Opposition ("Opposition") to Motion to Sever ("Motion").

**I. THE GOVERNMENT'S OPPOSITION IS BASELESS.**

Severance of improperly joined offenses is to be determined "solely by the allegations in the indictment" as a matter of law. *United States v. Terry*, 911 F.2d 272, 276 (9<sup>th</sup> Cir. 1990). Despite the government's attempt in its Opposition to "infer" a relationship between the alleged

1 false statements and the alleged negligent discharge claim, there is none – or at least to date,  
 2 there has been no evidence disclosed to the defense establishing any such connection. The  
 3 government should not be permitted to bootstrap an argument based on unsupported inference  
 4 and innuendo given the seriousness of the allegations at issue in this case. It strains credulity for  
 5 the government to argue – as it does in its Opposition – that Captain Cota’s negligence on  
 6 November 7, 2007 included his allegedly being “unfit for duty.” In its Indictment the  
 7 government specified six acts or omissions comprising its negligence claim – being unfit for duty  
 8 for medical reasons was not one of them. If the government has evidence of a connection  
 9 between the alleged false statements in January 2006 and January 2007 and the incident on  
 10 November 7, 2007, then it should have alleged such a connection and produced the supporting  
 11 evidence. The government did neither. Accordingly, the government should not be permitted to  
 12 draw connections and inferences based on unrelated conduct, suppositions and innuendo.

## 13 **II. CONCLUSION.**

14 For the foregoing reasons, Captain Cota respectfully requests that the Court sever the  
 15 felony false statement counts from the Clean Water Act and Migratory Bird Treaty Act counts.

17 Respectfully submitted,

20 K& L GATES LLP

22 Dated: July 11, 2008

22 By: /s/ Jeffrey L. Bornstein  
 23 Jeffrey L. Bornstein, Esq.  
 23 Luke G. Anderson, Esq.  
 24 Barry M. Hartman, Esq., *Admitted Pro Hac Vice*  
 24 Christopher R. Tate, Esq., *Admitted Pro Hac Vice*  
 25 Attorneys for Defendant  
 25 JOHN J. COTA

**PROOF OF SERVICE**

I am employed in the County of San Francisco, State of California by a member of the Bar of this Court, at whose direction this service was made. I am over the age of 18 and not a party to the within action. My business address is 55 Second Street, Suite 1700, San Francisco, CA 94105. On July 11, 2008, I served the document(s) described as:

**REPLY IN SUPPORT OF MOTION TO SEVER**

on the parties to this action named on the attached service list by the method described below.

(BY PERSONAL SERVICE) I caused a true and correct copy of said document(s) to be served by hand to the addressee(s) listed above, with the name and address of the person served shown on the envelope.

(BY OVERNIGHT DELIVERY) I enclosed a true and correct copy of said document(s) in an envelope/package provided by an overnight delivery carrier addressed to the addressee(s) listed above, sealed it, and placed it for collection and overnight delivery following the ordinary business practices of Kirkpatrick & Lockhart Preston Gates Ellis LLP. I am readily familiar with the firm's practice of collecting and processing correspondence for overnight delivery. On the same day that correspondence is placed for collection and overnight delivery, it is collected by an overnight delivery carrier. Delivery fees are pre-paid or provided for in accordance with the ordinary business practices of Kirkpatrick & Lockhart Preston Gates Ellis LLP.

(BY ELECTRONIC TRANSMISSION) I transmitted a true and correct copy of said document(s) by electronic mail to the offices of the addressee(s). I did not receive, within a reasonable time after the transmission, any message or other indication that the transmission was unsuccessful.

**X** (BY FACSIMILE) I transmitted a true and correct copy of said document(s) by facsimile to the offices of the addressee(s). Upon completion of the facsimile transmission, a transmission report was issued showing the transmission was complete and without error.

(BY U.S. MAIL) I enclosed a true and correct copy of said document(s) in an envelope addressed to the addressee(s) listed above and placed it for collection and mailing following the ordinary business practices of Kirkpatrick & Lockhart Preston Gates Ellis LLP. I am readily familiar with the firm's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service with postage fully prepaid at San Francisco, California.

Executed on July 11, 2008 at San Francisco, California.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Mae A. Chu  
Mae A. Chu

**SERVICE LIST**

**Stacey Geis, Esq.**  
**Jonathan Schmidt, Esq.**  
Assistant United States Attorneys  
U.S. Attorney's Office  
450 Golden Gate, 11th Floor  
San Francisco, CA 94102  
  
Fax: (415) 436-7234

**Richard Udell, Esq.**  
Senior Trial Attorney  
Environmental Crimes Section  
P.O. Box 23985  
L'Enfant Plaza Station  
Washington D.C. 20004  
  
Fax: (202) 514-8865